UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 19, 2009

CBCA 1073

OCWEN LOAN SERVICING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Gregory S. Jacobs, James P. Gallatin, Jr., and Lawrence S. Sher of Reed Smith LLP, Washington, DC, counsel for Appellant.

Dennis Foley, William Korth, Phil Kauffman, and Phillipa L. Anderson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DRUMMOND**.

DANIELS, Board Judge.

The Board grants this appeal in part due to the failure of the respondent, the Department of Veterans Affairs (VA), to produce evidence critical to its ability to prove that most of its claim is reasonably premised.

Background

On August 27, 2003, VA awarded to Ocwen Loan Servicing, LLC[1] (Ocwen) a contract to perform real estate owned services for the agency. Appeal File, Exhibit 1; Complaint ¶ 4, Answer ¶ 4. When a VA-guaranteed loan proceeds to foreclosure, and the property is conveyed to the VA, Ocwen assumes duties under the contract. Ocwen takes possession of the property, makes improvements and/or repairs to it, prepares it for listing to be sold to the public, coordinates the sale of the property and closing, and provides the sale proceeds to VA. Appeal File, Exhibit 1 at ¶ 2.1.2; Complaint ¶ 5, Answer ¶ 5.

Ocwen is paid for its services a percentage of the total sales price for each property sold. Appeal File, Exhibit 1 at ¶ 2.6.1.1; Complaint ¶ 6, Answer ¶ 6. The payment provisions of the contract also include the following paragraph:

> *Quarterly Performance Incentive Fee/Penalty. The Service Provider shall earn or be penalized a fee (calculated and paid/charged on a quarterly basis) based on its performance in obtaining the highest possible ROS. . . . If the return for a given quarter is higher than 100% [of the ROS], the Service Provider shall be entitled to be paid 20 percent of the difference. If the return for a given quarter is lower than 97%, VA shall deduct 20 percent of the difference between the 100% and the actual return from the Service Provider's invoice. The Service Provider may petition the Contracting Officer to temporarily adjust the Quarterly Performance Incentive Fee/Penalty if there is adequate evidence that the 97% penalty threshold cannot be met due to circumstances beyond the Service Provider's control . . . .*

Appeal File, Exhibit 1 at ¶ 2.6.1.3; *see also id.* at ¶ J-8.4.

The term "ROS," as used in the preceding paragraph, is an acronym for Return on Sale. Appeal File, Exhibit 1 at J-1-5. The contract defines this term as follows:

> A key performance measure of VA's success in recovering its costs for disposing of VA-acquired properties. ROS is based on all the properties that were sold, and for which final closings and invoices were submitted and

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[1] The contract was actually awarded to Ocwen Federal Bank FSB. Appeal File, Exhibit 1 at 1. The appeal was filed by Ocwen Loan Servicing, LLC, however, and the VA does not deny that Ocwen Loan Servicing, LLC is the contractor under this contract. *See* Complaint ¶ 3; Answer ¶ 3.

> processed, during the specified time period. ROS is calculated as VA's total income received from the properties that sold during a particular period of time divided by the sum of VA's total initial capital value (ICV) and VA's total expenses for the same set of properties.

Id. "Initial Capital Value/ICV," in turn, is defined as:

> The foreclosure appraisal value of the property discounted by (minus) VA's average historical cost of acquiring and disposing of the property.

Id. at J-1-3. "Foreclosure Appraisal" is:

> The assessment of value conducted in connection with the foreclosure used by VA to establish the initial Capital Value of a property.

Id. at J-1-2.

By decision dated December 6, 2007, a VA contracting officer claimed for the agency a penalty of $567,995 for the period ending June 30, 2005, and $427,511.47 for the period ending September 30, 2005. Appeal File, Exhibit 32. The total amount of this claim is $995,506.47.

Ocwen appealed the contracting officer's decision to the Board on February 11, 2008. In pursuing this appeal, Ocwen has contended that VA has made "arbitrary and unreasonable distinctions in calculating the penalties it has claimed under the Contract" and has "unreasonably refus[ed] to provide Ocwen with pre-foreclosure appraisal documents." Complaint ¶ 8. Ocwen has also maintained that pre-foreclosure appraisals value property in excess of post-foreclosure values and that the contractor requires pre-foreclosure appraisals to ascertain the condition of the properties prior to foreclosure, so that an assessment of the usefulness of those appraisals may be made. *Id.* ¶¶ 27, 32. In particular, Ocwen has asserted that without access to the pre-foreclosure appraisals, it cannot "provide adequate evidence, in accordance with Contract Section C, 2.6.1.3, to demonstrate that the Contract's ROS threshold could not be met because of circumstances beyond its control." *Id.* ¶ 32; *see also id.* ¶ 69.

As the contract makes clear, a critical factor in establishing the base from which penalties are calculated -- the ROS -- is the foreclosure appraisal values of the properties assigned to the "service provider," Ocwen. Despite numerous entreaties, however, VA has not provided to the Board or Ocwen copies of the appraisals which establish those values.

In accordance with a discovery plan proposed jointly by the parties and adopted by the Board, written discovery requests could be made after July 7, 2008, and responses were due within forty-five days following service. On July 15, 2008, Ocwen sent to VA requests for the production of documents, seeking, among other items, "All pre-foreclosure appraisals commissioned by the VA for properties listed for sale by Ocwen under the Contract during 2005." Under Board Rule 13(f)(2) (to be codified at 48 CFR 6101.13(f)(2) (2008)), objections to the requests for production were due within fifteen days after receipt of the requests (by July 30, 2008), and under the terms of the Board's discovery order, the documents should have been produced within forty-five days after receipt (by August 29, 2008). VA did not file an objection to this request (or to any of Ocwen's other written discovery requests) by July 30 and did not produce these documents (or respond to any of Ocwen's other written discovery requests) by August 29. VA later asked that the deadline for responses to the requests be extended to September 19. Ocwen agreed to extend the deadline, but nothing was forthcoming by September 19, either.

On October 16, 2008, Ocwen filed a motion to compel discovery, addressing both the pre-foreclosure appraisals and all other outstanding matters. The Board afforded VA an opportunity to respond to the motion. After reviewing the agency's excuses for its inaction and Ocwen's reply to that response, the presiding judge convened the attorneys for both parties for an in-person conference -- an extraordinary measure at this Board. At this conference, he counseled VA's attorneys regarding the importance of complying fully, and in a timely way, with discovery requests and orders. The Board also issued an order on November 12 which provided, in part:

> Respondent shall, no later than Friday, November 21, 2008, produce all documents responsive to appellant's requests for the production of documents. Respondent is cautioned that if it does not comply with this order, it may present no documentary evidence other than the exhibits contained in the appeal file.

On December 9, 2008, Ocwen filed a supplemental motion to compel discovery and for sanctions. The contractor asserted that the agency had complied with only nineteen of its sixty-two requests for document production. Ocwen specifically pointed to VA's continued failure to produce any pre-foreclosure appraisals. In response, VA asserted that it had fully complied with the Board's order. The agency noted that the production request for pre-foreclosure appraisals asked for "[a]ll pre-foreclosure appraisals commissioned by the VA for properties listed for sale by Ocwen under the Contract during 2005," and said that the agency does not commission appraisals and that "[t]here are no such documents in the possession of VA." The agency maintained that a request for "all pre-foreclosure documents in the possession of VA for properties listed for sale in 2005" would be "unreasonable,

unduly burdensome, and unduly expensive for VA." The agency asserted that many of the properties "listed for sale in 2005" were not included in the ROS penalty calculations that are the subject of this appeal.

Ocwen replied that VA had known "since at least June 2006" which pre-foreclosure appraisals the contractor was seeking and that if the agency had communicated any uncertainty about the request, the contractor "would have certainly agreed to narrow the scope of its request to only those properties included in the ROS calculation."

Taking the parties' positions into consideration, the Board issued an order on December 18, 2008, which contains this paragraph:

> Respondent shall produce to appellant, on or before Wednesday, December 31, 2008, all pre-foreclosure appraisals in its possession which pertain to properties sold by appellant and for which penalties which are the subject of this appeal were imposed. If respondent does not possess a pre-foreclosure appraisal for any of these properties but knows of an entity which does possess such an appraisal, it shall inform appellant on or before Wednesday, December 31, 2008, of the name, address, and telephone number of such entity. This information shall include, for each entity, a list of all such appraisals which respondent believes to be in the possession of the entity.

VA then filed a motion for a protective order. In the motion, VA asserted that it "would require several months to respond to Appellant's request for pre-foreclosure appraisals" and requested "a sufficient amount of time to produce the requested appraisals." Appended to the motion was a declaration from Lance P. Kornicker, a VA realty specialist who was the contracting officer's technical representative for the Ocwen contract. Mr. Kornicker stated in his declaration that "VA is aware of 4,363 acquired properties at issue for the disputed period of the last two quarters of FY [fiscal year] 2005." He said that the agency's Austin, Texas data center could "run a computer script to retrieve and to produce the records for the aforesaid properties" which were in the center's computer system, and that "[t]his radically simplifies and summarizes the process." Records for appraisals which were performed before that system came on line, however, would have to be obtained from the agency's nine regional loan centers, where they were stored. According to Mr. Kornicker, collection of the records from the regional centers, and creation of paper records from computer-readable records, would be very time-consuming. Ocwen opposed the motion, urging the Board not to afford VA more time to produce documents which it had previously said did not exist.

On December 23, 2008, the Board granted the motion in part, directing:

> Respondent shall produce to appellant, on or before Wednesday, December 31, 2008, all pre-foreclosure appraisals in its possession which (a) pertain to properties sold by appellant and for which penalties which are the subject of this appeal were imposed and (b) can be identified by running a computer script at respondent's Austin, Texas data center. If respondent also provides to appellant by December 31, 2008, a computer program (and instructions for its use) which will enable appellant to view these appraisals in electronic form, and print out hard copies of the appraisals, respondent may satisfy this order by producing these appraisals in electronic form.
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> After appellant reviews the pre-foreclosure appraisals which meet both qualification (a) and qualification (b) . . . , it shall determine its need for all pre-foreclosure appraisals which meet qualification (a) but not qualification (b). Appellant shall then inform respondent of its need, if any, for the additional appraisals.

On December 24, 2008, VA filed a supplemental motion for a protective order. The motion misconstrued Mr. Kornicker's declaration to read that production of each appraisal in electronic form would take one hour. Again, the agency asked for more time to produce the appraisals. The Board denied the motion, noting that Mr. Kornicker's estimate had been for the production of hard copies and that he had stated that production of electronic versions would be relatively simple. Evidently, Mr. Kornicker's assessment of the situation was far more accurate than agency counsel's, for on December 30, VA produced a computer disk which allegedly contained 636 pre-foreclosure appraisals.

By motion filed on January 12, 2009, Ocwen asked the Board to compel VA to produce all remaining pre-foreclosure appraisals which pertain to properties sold by the contractor and for which penalties that are the subject of this appeal were imposed -- as well as all other documents responsive to the contractor's requests for production which had not yet been produced. With regard to the pre-foreclosure appraisals, Ocwen called to our attention a January 9 electronic mail message from agency counsel. The contractor's counsel had asked agency counsel, "Are there additional responsive files located outside of the Austin, TX data center?" The response had been, "There may be additional files in third-party appraisers' hands. However, those appraisers do not work for the VA and are under no contractual obligation to the VA. . . . VA has no control or obligation to control those entities."

In addition to noting the inconsistency between this response and Mr. Kornicker's declaration that the additional appraisals were located at VA regional loan centers, Ocwen maintained:

> Because a property's pre-foreclosure appraisal value forms the basis for the initial capital value (the amount used to calculate Return on Sale ("ROS") for a property), the VA's purported failure to retain or produce the documents demonstrating the pre-foreclosure appraisal value severely undermines Appellant's ability to verify, challenge, and/or understand the basis for that value. Further, it calls into question how the VA could have imposed penalties on Ocwen regarding properties for which it had no basis to verify the pre-foreclosure property value.
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> Ocwen asked --
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> that Rule 33 sanctions and/or other remedies, including but not limited to a specific sanction which would preclude Respondent from imposing any ROS penalties under the contract for any property for which Respondent refuses or has failed to provide a pre-foreclosure appraisal, be imposed against the VA, as previously requested, to address Respondent's repeated discovery violations and to overcome this serious prejudice to Appellant's ability to prove its case.

With regard to documents other than pre-foreclosure appraisals, Ocwen doubted that none of the requested documents were in VA's possession. It asked the Board to "require Respondent to submit a sworn declaration from an authorized VA representative that the VA has, to the best of his or her knowledge, produced all documents in its possession or control that are responsive to each of Ocwen's Requests for Production."

In response to this motion, VA said that it was canvassing its regional loan centers to find requested documents there and was assembling a list of appraisers used during the disputed period. The agency promised to provide to the contractor all appraisals at the centers and the list of appraisers. VA disputed the appropriateness of imposition of sanctions.

On January 27, 2009, the Board issued an order addressing Ocwen's January 12 motion. The order provided as follows:

> Respondent has resisted, for various reasons, providing to appellant, in discovery, copies of the pre-foreclosure appraisals which pertain to properties sold by appellant and for which penalties that are the subject of this appeal

were imposed. As the Board understands the contract between the parties, penalties may be imposed on appellant by respondent when sales returns for a given period fall below a specified percentage of a pre-determined Return on Sale (ROS) amount, and a key factor in determining the ROS amount is foreclosure appraisal values. The claim before the Board is a government claim for penalties, so respondent bears the burden of proving the validity of the claim. If respondent does not provide an appraisal, for inspection and analysis by appellant, the Board will have no basis on which to conclude that the ROS amount for the property in question was reasonable. Without a rationally-premised ROS amount, the Board will have no basis on which to conclude that a penalty calculated with reference to that ROS amount is reasonable. Consequently, it is and has always been incumbent on respondent to produce the appraisals in order to prevail in the case.

The Board is mystified as to why respondent has resisted for so long producing in discovery documents which are critical to its success in the case. These documents should have been produced, under the Board's [order], by August [29], 2008 (in response to appellant's July 15, 2008, request). The Board will afford respondent one last chance to produce the documents. Respondent is ordered to produce to appellant, by Friday, February 27, 2009, each and every foreclosure appraisal on which it intends to rely in maintaining that the penalties it is claiming are reasonable. Respondent has now been afforded [nearly] six months in addition to the time provided by our [order] to produce the documents in question. The Board will preclude respondent from introducing, or relying on, any foreclosure appraisal it has not produced to appellant by February 27.

Respondent remains obligated to produce to appellant, in discovery, all documents other than the pre-foreclosure appraisals which are responsive to appellant's requests for production. If respondent is confused by any of the requests, it should long ago have asked appellant for clarification; in any event, much clarification is provided in appellant's second supplemental motion to compel. To the extent that respondent has documents which are responsive to appellant's requests for production but have not yet been produced (other than the pre-foreclosure appraisals), respondent is ordered to supplement its response to appellant's requests, so as to make its response complete, by Friday, February 13, 2009. Respondent shall also file with the Board (with a copy to appellant), by Friday, February 13, a sworn declaration from a knowledgeable, authorized representative of respondent. That sworn declaration shall (a) explain all of respondent's efforts to find documents

> which are responsive to the requests and (b) state that to the best of the declarant's knowledge, respondent has produced all documents in its possession or control that are responsive to each of appellant's requests for production.

VA did not comply with this order. It did not produce to Ocwen any foreclosure appraisals by February 27. It did not supplement its response to Ocwen's requests for the production of documents other than appraisals by February 13. It did not file with the Board a sworn declaration from any VA employee by February 13.

On March 3, 2009, Ocwen filed another motion for sanctions. In this motion, the contractor maintained:

> Respondent's complete disregard and contempt of the Board's January 27, 2009 Order, considered in conjunction with Respondent's numerous and flagrant violations of Board Rules and Orders throughout this Appeal, should be sanctioned by the Board with entry of judgment in favor of Appellant. Given Respondent's patent unwillingness to meaningfully participate any further in this Appeal, judgment in Appellant's favor is the only relief that is appropriate.

The Board issued an order on March 3, authorizing VA to file a response to this motion on or before March 10. We also asked VA to respond to the following questions:

> Should the Board grant summary relief to appellant as to all penalties assessed with respect to properties for which respondent has not provided pre-foreclosure appraisals? Appellant notes that "a property's pre-foreclosure appraisal value forms the basis for the initial capital value (the amount used to calculate Return on Sale ('ROS') for a property." Motion at 5. A penalty is assessed with respect to the ROS. Contract at C-9. If a pre-foreclosure appraisal value for a property is not included in the evidence on which the Board will decide the case, how can a penalty be justified as to that property?

On March 5, VA filed an "initial response" to the order. This filing stated in full, "The Respondent intends to respond to said Order by close of business on 11 March 2009." By order issued later on March 5, the Board said that it --

> appreciates respondent's attentiveness to the order and assumes that the reference to "11 March" is a typographic error, since respondent must realize that it is not the province of a party to determine when it will respond to a

> Board order. The last date for filing a response was established as, and remains, March 10, 2009. The Board will accept filings on that date, as on other dates, as late as 4:30 p.m., Eastern Time. Rule 1(b)(5), (10).

We also advised VA that a party wishing an enlargement of time for a filing may request one, following the provisions of Rule 3(b).

VA did not request an enlargement of time in which to file its response to Ocwen's March 3 motion for sanctions. The agency did not respond to the motion by March 10, which the Board had identified as "[t]he last date for filing a response." VA did file a response, with numerous attachments, on March 11. Ocwen moved to strike this untimely response.

The Board cautioned the parties early in the proceedings, in an order issued on June 26, 2008, "The Board is not required to accept untimely filings." We amplified this warning, with specific reference to a response to Ocwen's March 3, 2009, motion for sanctions, on March 5, 2009. In light of these express cautions, the motion to strike is granted. We treat VA's March 11 filings as not having been made.

Discussion

Board Rule 33(c), "Sanctions," provides:

> When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions. The sanctions may include:
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> (1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party submitting the discovery request;
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> . . . .
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> (4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony;
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> . . . .
>
> (6) Dismissing the case or any part thereof;

. . . . or

(8) Imposing such other sanctions as the Board deems appropriate.

As the General Services Board of Contract Appeals stated in *Writing Co. v. Department of the Treasury*, GSBCA 15634-TD, 03-1 BCA ¶ 32,107, at 158,760:

> This rule is much like Federal Rule of Civil Procedure 37(b). The Supreme Court has explained, "Rule 37(b)(2) contains two standards -- one general and one specific -- that limit a [trial court or board's] discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *see generally* 2 James Wm. Moore, et al., *Moore's Manual Federal Practice & Procedure* § 15.13 (1995).

Throughout the discovery process in this appeal, VA has failed to produce pre-foreclosure appraisals which are of critical importance to the agency's claim. The whereabouts of those appraisals is uncertain, for it seems to change with each passing filing by the agency. Wherever they may be, however, they have not been produced, despite a lack of objection to their production, repeated requests and motions by the contractor, and repeated orders by the Board.

In its order of January 27, 2009, the Board pointed out to VA the vital importance of these documents to its claim and made clear that it would "preclude respondent from introducing, or relying on, any foreclosure appraisal it has not produced to appellant by February 27." Precluding VA from introducing in evidence any of the pre-foreclosure appraisals it has failed to produce simply enforces an order which we have already made in this case. This is the least we can do in fairness to Ocwen, which has been trying for many months, if not years, to examine the appraisals in order to test their reasonableness. The sanction is just, and it is specifically related to VA's claim, which is at issue in the case. *See Writing Co.*, 03-1 BCA at 158,760 (citing *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1373-74 (Fed. Cir. 2002)). We now impose that sanction.

Under the contract involved here, VA may impose penalties on Ocwen for its performance only when the proceeds obtained by the contractor in selling properties is less than a pre-determined Return on Sale. The ROS is dependent in large part on the Initial Capital Value of properties, and that ICV is in turn dependent in large part on Foreclosure Appraisals -- "assessment[s] of value conducted in connection with . . . foreclosure[s]." In the absence of an appraisal, an ICV cannot be determined. In the absence of an ICV, an ROS

cannot be determined. In the absence of an ROS, no penalty can be imposed. Thus, for the properties for which VA is not permitted to introduce into evidence a foreclosure appraisal, there is no basis for imposing a penalty on Ocwen. We consequently grant the appeal as to the penalties imposed with respect to those properties.

In taking this action, we recognize that VA has a figure for the appraised value of each of the properties in question. Without access to the appraisal itself, however, there is no way of knowing whether this figure is reasonably-premised or not. Ocwen has for years been unable to obtain the basis for taking advantage of a right granted to it by the contract -- formulating a well-grounded petition for a temporary adjustment in the penalty on the theory that the 97% threshold used in the assessment of penalties could not be met due to circumstances beyond Ocwen's control. More important at the moment, Ocwen has no way of evaluating whether the appraisal figure is reasonably-premised and, if Ocwen concludes that it is not, explaining to the Board why this is so. Most important of all, the Board has no basis for accepting the appraisal figure as reasonable.

We are reluctant to grant Ocwen's motion for sanctions more extensively at this time. VA has responded to some of the contractor's discovery requests, and it has not fully abandoned its responsibilities to prosecute the case. We are not certain, however, whether the agency can, without reference to the great bulk of appraisals, establish that any penalties may fairly be imposed on the contractor. The contract requires that an ROS be based on all properties sold during a particular period, and it is not clear whether, by eliminating properties from the universe from which an ROS might be calculated, it is possible to calculate an ROS. We therefore hold in abeyance a ruling on the remainder of Ocwen's motion. VA is directed to provide to the Board and the contractor, within two weeks from the date of this decision -- by Thursday, April 2, 2009, a proffer of the portion of the claim (if any) it believes survives the decision. If the proffer is that some of the claim survives, the proffer shall include a detailed explanation of how that amount is calculated and a complete list of the evidence which may be relied upon to support the amount. After reviewing this proffer, and considering Ocwen's comments on it, we will rule on the part of the motion as to which we have now held in abeyance.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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JEROME M. DRUMMOND
Board Judge